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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

In the Matter of the Petition of the SOUTHERN RAILWAY COMPANY, a Corporation,

vs.

JACK W. HUSSEY.

No. 342

PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SAMUEL B. McPHEETERS,
CHARLES A. HOUTS,
Counsel for Southern Railway Company.

H. N. QUIGLEY,
Of Counsel.

St. Louis Law Printing Co., 416 North Eighth Street. CHestnut 6477.

INDEX.

	Page
Petition for writ of certiorari	1-16
Summary and statement of the matter involved	2
Reasons relied on for the allowance of the writ	9
Brief in support of petition for certiorari	17-52
Opinion of the United States Circuit Court of Appeals for the Eighth Circuit	17
Date of judgment to be reviewed	17
Statement of case	18
Specifications of error	24
Argument	25

Authorities Cited.

Arrowsmith v. R. R., 57 Fed. 165	10, 33
Booth v. R. R., 217 Mo. 710	11, 32
Burns' Anno. Ind. Stat. 1926, Section 12808	45
Burns' Annot. Indiana Statutes 1926, Section 12931, Vol. 3	19, 42, 47
Cain v. R. R., 27 Ap. Div. 376 (N. Y.)	11, 37
Clough v. R. R., 155 Fed. 81	10, 35
1 Elliott on Railroads, Sec. 540	11, 30
Hayes v. R. R., 74 Fed. 279	10
Hukill v. R. R., 72 Fed. 745	10
Illinois Central v. Barron, 5 Wall. 90	11, 26
Interstate Commerce Act, Section 4 of Paragraph 3	44
Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stats. 938	17
Moorshead v. United Rwy. Co., 203 Mo. 121	11, 31
N. Y., N. H. & H. Co. v. Baker, 98 Fed. 694	9, 41
Pa. Steel Co. v. N. Y. City Railway Company, 229 Fed. 367	10, 35
R. R. v. Dunbar, 20 Ill. 623	27

R. R. v. Friedell, 79 Ga. 489 ..... 11, 39
R. R. v. Hoechner, 67 Fed. 456 ..... 10, 34
R. R. v. McCarthy, 20 Ill. 385 ..... [illegible]
R. R. v. Railroad Commission, 171 Ind. 189 49
R. R. v. Sheegog, 215 U. S. 308 ..... 11, 27, 29
R. R. v. Whipple, 22 Ill. 105 28
R. R. v. Zachry, 232 U. S. 248 27
Stevenson v. Lake Terminal R. R. Co., decided July 7, 1930 10
3 Thompson on Railroads, Sec. 3383 ..... 11, 29
Sprague v. Smith, 29 Vt. 421 ..... 11, 39
Stoddard v. R. R., 181 Mass. 422 ..... 11, 25, 30
Willard v. R. R., 124 Fed. 796 10
Wright v. Rwy., L. R. 8 Exch. 137, and cases cited under Reason II 11, 40
Yates v. Ill. Central R. R., 137 Fed. 943 10

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PETITION FOR WRIT OF CERTIORARI and BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

In re Southern Railway Company, a corporation, applying for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Southern Railway Company respectfully shows to this Honorable Court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

1. That your petitioner is aggrieved by the final judgment and decision of the Circuit Court of Appeals for the Eighth Circuit, entered in that court on the 26th day of June, 1930, in the case entitled Southern Railway Company, appellant, v. Jack W. Hussey, appellee, No. 8717.

2. The important question before that court, decided adversely to the contention of petitioner, was this:

> Is the Southern Railway Company, petitioner, liable to one of its passengers for injuries received in a collision occurring in Indiana, between one of your petitioner's trains and a train of the Evansville, Indianapolis & Terre Haute Railroad Company, without fault on petitioner's part, caused (as alleged) by the negligence of the employes of the Evansville Company in failing to close a switch which
>
> (a) formed a connection between the track of the Southern Company and the track of the Evansville Company;
>
> (b) was installed, owned, controlled and operated exclusively by and for the benefit of the Evansville Company;
>
> (c) was so constructed, maintained and operated under compulsion of a statute of Indiana which made it mandatory upon petitioner to permit its construction and operation; and
>
> (d) was so constructed and operated under a contract expressly authorized by the statutes of the State of Indiana.

3. The facts giving rise to the foregoing question are these:

The Southern Railway Company and the Southern Railway Company of Indiana owned and operated a line of railroad from Louisville, Kentucky, through Indiana to St. Louis, Missouri. The Evansville, Indianapolis & Terre Haute Railroad Company, an Indiana corporation, owns lines of railroad in Indiana. Among the lines owned by the latter company is a coal road extending southwardly from Mine Junction, which is on petitioner's road, to a coal mine of the Francisco Mining Company. The main line of the Evansville Company intersects the line of the Southern Company at Oakland City, which is seven miles east of Mine Junction. In 1922 the Evansville Company, owning the coal road above referred to, desired a connection with the Southern Company's track at Mine Junction and running rights over the Southern Railroad to Oakland City. The sixth subdivision of section 12,931, Vol. 3, Burns' Annot. Indiana Statutes 1926, gave to railroads of that state the right:

> "To cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its construction";

and by the same subdivision of the statute referred to it was further provided that:

"every company whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

The Evansville Company having the right to the connection desired, and the Southern Railway Company being under compulsion to grant such connection, the two companies on January 11, 1922, entered into a contract (Tr., p. 115), in which it was recited that the Southern Company had, for the accommodation of the Evansville Company, constructed a connection between the two tracks, the cost of which the Evansville Company agreed to pay the Southern Company, and by which the Evansville Company undertook to maintain this connection at its own cost and expense; and by which the operation of the Evansville Company's trains between Mine Junction and Oakland City was provided for.

The switch connection here involved was of the ordinary type. The Southern's track at that point runs east and west. The lever by which the switch was opened and closed was on the south side of the Southern Company's track. On the north side of the track was a signal device. The lever and signal device were so connected by throw rods that a green light would be automatically displayed to approaching Southern Company trains if the switch was closed, and a red light would be displayed to approaching Southern trains if the switch was open. The

green light meant go ahead; the red light meant stop. This switch and the light connection were standard equipment (Tr., p. 105). It had been installed for five years and had never been out of order (Tr., pp. 104-110). It had been inspected on the day preceding the accident and had been found in perfect condition (Tr., p. 110).

The collision between the Southern train, on which Hussey was a passenger, and the train of the Evansville Company occurred at about 1:30 o'clock in the morning. Earlier that night the Evansville crew involved in the accident had brought some empty coal cars from Oakland City, had passed over this switch and delivered the cars at the coal mine; had returned, passing over the switch, to Oakland City with loaded cars of coal, and had then made a second trip to the coal mine with empty cars. Having assembled another train of coal cars at the mine, they proceeded to the junction point and stopped two or three car lengths south of the switch. They had to wait about thirty minutes for a Southern freight train which was westbound. After this freight train passed the conductor of the Evansville train crew announced that they would proceed to Oakland City. Whereupon Carson (one of his two switchmen) went to the switch, operated the lever so as to open the switch, and returned to a telephone booth, where the conductor and the other switchman were standing, about twenty or thirty feet away. The conductor then learning that the Southern's westbound passenger train was on time, directed Carson to

go to the engineer and ask the engineer if they had time to make Oakland City ahead of the Southern train. Carson did as he was directed and was informed by the engineer that they did not have enough time to make Oakland City. Carson then started to return to the switch for the purpose of closing it so that the Southern train might pass, but noticing that the green light was displayed, he concluded that the conductor or the switchman, whom he had left near the switch, had closed it. He changed his course and joined the conductor and switchman near the telephone booth, where all three remained awaiting the Southern passenger train. It was as much the duty of the conductor and the other switchman to operate the switches as it was Carson's. But they, too, had observed that the signal showed green, thus indicating that the switch was closed, and so all three of them having observed the proper setting of the light, dismissed the subject and waited until the Southern passenger train came along. Hussey was a passenger on that train. When the Southern passenger train approached the engineer observed the green light displayed and proceeded, as it was his duty to do. In fact, the switch was open and when the train reached the switch it was deflected to the Evansville track and collided with the Evansville train and Hussey was injured. One or more train employes were killed.

An investigation was immediately started, and it was discovered that the failure of the signal to operate prop-

erly was due to a fresh break in a connection between the light staff and the lever which opened and shut the switch. Presumably, this connection had been broken when the Southern freight train passed over this switch, some thirty minutes before the accident.

Hussey brought his suit against the Southern Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. The case was removed to the District Court of the United States for the Eastern District of Missouri, where the case was dismissed as to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and an amended petition was filed against the Southern Railway Company alone. Upon the trial the facts above stated were developed.

The District Court, in its charge to the jury, said:

> "The Court further charges you, as a matter of law, that, under the circumstances in evidence, the Southern Railway Company is responsible for the negligent acts, if any, on the part of the servants of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch mentioned in evidence."

The jury returned a verdict in Hussey's favor for $20,000.00.

Upon appeal the Circuit Court of Appeals for the Eighth Circuit, after having stated that the cases bearing on the

question of liability here involved "seemed to be, and in some instances were in conflict, or, at least, in confusion," said:

> "It is clear that this accident happened in connection with this switch, either because of defective appliance or because of the operation of that appliance by the railroad given by appellant the right to operate it. The duty of the appellant towards its passengers was to use the highest degree of care to keep that switch safe for the transportation of such passengers over it. Neither as to the maintenance nor as to the use of that switch can the appellant avoid this duty of care. It cannot delegate the duty of maintaining a proper switch appliance so as to lessen its duty in that regard. Equally, it cannot delegate the operation of that appliance so as to lessen its duty.
>
> "The case of Illinois Central Railroad v. Barron, 5 Wall. 90, is directly in point and determines this contention adversely to appellant."

The opinion of the Court of Appeals will be found at page 151 and following of the transcript.

The judgment of that court was entered on June 26, 1930.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Court of Appeals, that the Southern Railway Company is liable for the negligence of the employes of the Evansville Company in the operation of the switch in question, notwithstanding the fact that the statutes of Indiana compel the Southern Railway Company to permit the Evansville Company to maintain and operate such switch upon its line of railroad, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of N. Y., N. H. & H. Co. v. Baker, 98 Fed. 694, wherein that Court decided that the railroad there involved was not responsible to a passenger for the negligence of a contractor engaged in elevating the railroad company's tracks under employment from a state board, to whom the Legislature, by statute, had delegated the power to make the improvement there under way, and wherein that Court absolved the railroad company from liability upon the consideration that "the state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad, nor even by the state, but by an independent board, in the creation of which the defendant had no voice, over whose selection of employes it had no control, and with the discharge of whose functions it could not interfere and whose operations it was powerless to prevent."

II.

The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of R. R. v. Hoechner, 67 Fed. 456 (opinion by Judge Lurton); with the decision of the same Court in the case of Hukill v. R. R., 72 Fed. 745 (opinion by Judge Taft); with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of Hayes v. R. R., 74 Fed. 279; with the decision of the Circuit Court of Appeals for the Second Circuit in the case of Pa. Steel Co. v. N. Y. City Railway Company, 229 Fed. 367; with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of Stevenson v. Lake Terminal R. R. Co., decided July 7th, 1930, and not yet reported; and with the decisions of the federal courts in the following cases:

Arrowsmith v. R. R., 57 Fed. 165;
Willard v. R. R., 124 Fed. 796;
Yates v. Ill. Central R. R., 137 Fed. 943;
Clough v. R. R., 155 Fed. 81.

In which cases it was decided that where, *by legislative authority*, one railroad grants to another, by lease or contract, the right to operate over its lines, the owning road, unless itself negligent, is not liable for the negligence of the other road.

III.

The question of the liability of a railroad company for the negligence of another road which, under legislative authority, is admitted upon or across its tracks, is one of great importance; and the Court of Appeals in deciding that a railroad company which, by permission of the state, and, indeed, by its command, admits another road to the use of its properties, is liable for the negligence of the employes of such other road, is in conflict with the weight of authority as reflected in the following:

R. R. v. Sheegog, 215 U. S. 308;
3 Thompson on Railroads, Sec. 3383;
1 Elliott on Railroads, Sec. 540;
Moorshead v. United Rwy. Co., 203 Mo. 121;
Booth v. R. R., 217 Mo. 710;
Cain v. R. R., 27 App. Div. 376 (N. Y.);
Sprague v. Smith, 29 Vt. 421;
Stoddard v. R. R., 181 Mass. 422;
R. R. v. Friedell, 79 Ga. 489;
Wright v. Rwy., L. R. 8 Exch. 137, and cases cited under Reason II.

IV.

The Court of Appeals decided this case adversely to the contention of petitioner chiefly upon authority of the case of Illinois Central v. Barron, 5 Wall. 90. The Barron case arose under the laws of Illinois, whose laws denied to a railroad company the right to lease or grant running rights

over its lines, and whose courts had decided that a road operating over the lines of another without legislative authority did so wrongfully and became the agent of the owning road, and for that reason the owning road became liable for the negligence of the road so operating. The Barron case merely applied the local law. By interpreting the Barron case as establishing the principle that the owning road is liable for the negligence of the road operating on its line under any and all circumstances, regardless of whether or not the Legislature has authorized or directed such operation, the Court of Appeals has given to the Barron case an unjustified significance which will add to the confusion and emphasize the conflict of decisions upon this very important question, unless this Court reviews the question and makes an authoritative pronouncement upon it.

V.

The importance to the railroads of the country of having this question definitely decided will further appear when it is considered that under the Interstate Commerce Act (paragraph 9, Sec. 1) the Interstate Commerce Commission is given authority *to compel* interstate railroads to accord switch connections to any "lateral, branch line of railroad, or private sidetrack"; that by section 4 of paragraph 3 it (the Interstate Commerce Commission) "shall have the power to require the use of any such ter-

minal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier by another carrier or other carriers"; that by the Interstate Commerce Act one carrier is authorized to lease the road of another (paragraph 2, Sec. 5); that by the laws of practically all the states the state commissions are given corresponding powers with respect to roads within their respective states; that under these provisions the railroads are permitted, and in many cases required, to admit other roads upon or across their tracks. The larger systems traverse many different states. Until this Court gives an authoritative decision upon this question these interstate carriers will be subjected to conflicting decisions and differing liabilities in the various states through which they operate, and will be confused as to their liability when confronting the necessity or desirability of admitting other roads to the use of their properties.

VI.

The question has added importance to the railroads from the fact that Congress has directed the Interstate Commerce Commission to investigate and suggest the consolidation of the railroads of the United States into a small number of large systems. The Interstate Commerce Commission has made such an investigation and has suggested the formation of certain systems, each of which is to be formed by the consolidation of numerous existing railroads. Some of these consolidations are being effected by

the leasing of one or more roads to another. (See lease of Michigan Central to New York Central; lease of Cleveland, Cincinnati, Chicago & St. Louis Railway Company to New York Central.) It is important, therefore, to the railroads to know whether the owning company, when it leases its road to an operating company, remains liable for the negligent acts of the operating company.

Your petitioner files herewith a certified copy of the entire transcript of the record of all proceedings in this case in the Circuit Court of Appeals for the Eighth Circuit.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings in the case of Southern Railway Company v. Jack W. Hussey, numbered 8717, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit in that cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and this your petitioner will ever pray.

SAMUEL B. McPHEETERS,
CHARLES A. HOUTS,
Counsel for Southern Railway Company.

State of Missouri, }
City of St. Louis. } ss.

Before me, the undersigned notary public within and for the City of St. Louis, and State of Missouri, personally appeared Charles A. Houts, who, being by me first duly sworn, deposes and says that he is one of the counsel for the petitioner herein; that the petitioner, Southern Railway Company, is a citizen of the State of Virginia; that he is familiar with the proceedings described in the foregoing petition for writ of certiorari; that the facts stated in said petition are true and correct to the best of his knowledge and information, and he believes them to be true; that in his opinion the petition is well founded and the case is one in which the prayer of said petition should be granted by this Court.

Charles A. Houts.

Subscribed and sworn to before me this 6th day of August, 1930, in the City of St. Louis.

My commission expires October 23, 1933.

Anna Belle Evans,
Notary Public.

We hereby certify that we have examined and are familiar with the contents of the foregoing petition for certiorari, and in our opinion it is well founded and entitled to the favorable consideration of the Court, and we certify that it is not filed for the purposes of delay.

Samuel B. McPheeters,
Charles A. Houts.

Dated August 6th, 1930.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed on the 26th day of June, 1930, and is to be found at page 150 et seq. of the transcript of the record.

II.

The date of the judgment to be reviewed is June 26th, 1930.

The judgment is printed in the record at page 159, and it states the ruling of the United States Circuit Court of Appeals for the Eighth Circuit relied on as basis of this Court's jurisdiction.

The petition for review on writ of certiorari is made upon authority of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938.

As the jurisdiction does not depend on the nature of the claims advanced, and the rulings made thereon in the Circuit Court of Appeals for the Eighth Circuit, these are not summarized under this heading, but are discussed under the heads of "Statement of Case" and "Argument."

As the right of this Court to review by certiorari the question herein presented is clearly given by the statutes, no cases are cited to support such right.

III.

STATEMENT OF CASE.

The principal question presented to the United States Circuit Court of Appeals for the Eighth Circuit and decided adversely to petitioner by it was this:

> Is the Southern Railway Company, petitioner, liable to one of its passengers for injuries received in a collision occurring in Indiana, between one of your petitioner's trains and a train of the Evansville, Indianapolis & Terre Haute Railroad Company, without fault on petitioner's part, caused (as alleged) by the negligence of the employes of the Evansville Company in failing to close a switch which
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> (a) formed a connection between the track of the Southern Company and the track of the Evansville Company;
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> (b) was installed, owned, controlled and operated exclusively by, and for the benefit of, the Evansville Company;
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> (c) was so constructed, maintained and operated under compulsion of a statute of Indiana which made it mandatory upon petitioner to permit its construction and operation; and
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> (d) was so constructed and operated under a contract expressly authorized by the statutes of the State of Indiana.

The facts giving rise to the foregoing question are these: The Southern Railway Company and the Southern Railway Company of Indiana owned and operated a line of

railroad from Louisville, Kentucky, through Indiana to St. Louis, Missouri. The Evansville, Indianapolis & Terre Haute Railroad Company, an Indiana corporation, owns lines of railroad in Indiana. Among the lines owned by the latter company is a coal road extending southwardly from Mine Junction, which is on petitioner's road, to a coal mine of the Francisco Mining Company. The main line of the Evansville Company intersects the line of the Southern Company at Oakland City, which is seven miles east of Mine Junction. In 1922 the Evansville Company, owning the coal road above referred to, desired a connection with the Southern Company's track at Mine Junction and running rights over the Southern Railroad to Oakland City.

The Sixth Subdivision of Section 12931, Vol. 3, Burns' Annot. Indiana Statutes 1926, gave to railroads of that state the right

> "to cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences, in furtherance of the objects of its construction";

and by the same subdivision of the statute referred to it was further provided that

> "every company whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite

with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

The Evansville Company, having the right to the connection desired, and the Southern Railway Company being under compulsion to grant such connection, the two companies, on January 11, 1922, entered into a contract (Tr., p. 115), in which it was recited that the Southern Company had, for the accommodation of the Evansville Company, constructed a connection between the two tracks, the cost of which the Evansville Company agreed to pay the Southern Company; and by which the Evansville Company undertook to maintain this connection at its own cost and expense; and by which the operation of the Evansville Company's trains between Mine Junction and Oakland was provided for.

The switch connection here involved was of the ordinary type. The Southern's track at that point runs east and west. The lever by which the switch was opened and closed was on the south side of the Southern Company's track. On the north side of the track was a signal device. The lever and signal device were so connected by throw rods that a green light would be automatically displayed to approaching Southern Company trains if the switch was closed, and a red light would be displayed to approaching Southern trains if the switch was open. The green light meant go ahead; the red light meant to stop. This switch and the light connection were standard equipment (Tr.,

p. 105). It had been installed for five years and had never been out of order (Tr., pp. 104-110). It had been inspected on the day preceding the accident and had been found in perfect condition (Tr., p. 110).

The collision between the Southern train on which Hussey was a passenger, and the train of the Evansville Company occurred at about 1:30 o'clock in the morning. Earlier that night the Evansville crew involved in the accident had brought some empty coal cars from Oakland City, had passed over this switch and delivered the cars at the coal mine; had returned, passing over the switch, to Oakland City with loaded cars of coal, and had then made a second trip to the coal mine with empty cars. Having assembled another train of coal cars at the mine they proceeded to the junction point and stopped two or three car lengths south of the switch. They had to wait about thirty minutes for a Southern freight train which was westbound. After this freight train passed the conductor of the Evansville train crew announced that they would proceed to Oakland City. Whereupon Carson (one of his two switchmen), went to the switch, operated the lever so as to open the switch, and returned to a telephone booth, where the conductor and the other switchman were standing, about twenty or thirty feet away. The conductor then learning that the Southern's westbound passenger train was on time, directed Carson to go to the engineer and ask the engineer if they had time to make Oakland City ahead of the Southern train. Carson did as he was directed and

was informed by the engineer that they did not have enough time to make Oakland City Carson then started to return to the switch for the purpose of closing it so that the Southern train might pass, but noticing that the green light was displayed, he concluded that the conductor or the switchman, whom he had left near the switch, had closed it. He changed his course and joined the conductor and switchman near the telephone booth where all three remained awaiting the Southern passenger train. It was as much the duty of the conductor and the other switchman to operate switches as it was Carson's. But they, too, had observed that the signal showed green, thus indicating that the switch was closed, and so all three of them having observed the proper setting of the light, dismissed the subject and waited until the Southern passenger train came along. Hussey was a passenger on that train. When the Southern passenger train approached the engineer observed the green light displayed and proceeded, as it was his duty to do. In fact the switch was open and when the train reached the switch it was deflected to the Evansville track and collided with the Evansville train and Hussey was injured. One or more train employes were killed.

An investigation was immediately started, and it was discovered that the failure of the signal to operate properly was due to a fresh break in a connection between the light staff and the lever which opened and shut the switch. Presumably this connection had been broken when the Southern freight train passed over this switch some thirty minutes before the accident.

Hussey brought his suit against the Southern Railway Company and the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. The case was removed to the District Court of the United States for the Eastern District of Missouri, where the case was dismissed as to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and an amended petition was filed against the Southern Railway Company alone. Upon the trial the facts above stated were developed.

The District Court, in its charge to the jury, said:

> "The Court further charges you, as a matter of law, that, under the circumstances in evidence, the Southern Railway Company is responsible for the negligent acts, if any, on the part of the servants of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch mentioned in evidence."

The jury returned a verdict in Hussey's favor for $20,000.00.

Upon appeal the Circuit Court of Appeals for the Eighth Circuit, after having stated that the cases bearing on the question of liability here involved "seemed to be, and in some instances were, in conflict, or, at least, in confusion," said:

> "It is clear that the accident happened in connection with this switch—either because of defective appliance or because of the operation of that appliance

by the railroad given by appellant the right to operate it. The duty of the appellant towards its passengers was to use the highest degree of care to keep that switch safe for the transportation of such passengers over it. Neither as to the maintenance nor as to the use of that switch can the appellant avoid this duty of care. It cannot delegate the duty of maintaining a proper switch appliance so as to lessen its duty in that regard. Equally, it cannot delegate the operation of that appliance so as to lessen its duty."

IV.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals was in error in holding that the Southern Railway Company is responsible for the negligence of the employes of the Evansville, Indianapolis & Terre Haute Railroad Company in the operation of the switch in question, that switch having been installed for and exclusively used by the latter road, under authority of, and by express command, of the statutes of Indiana.

2. The Circuit Court of Appeals erred in holding that there was sufficient evidence of negligence to require the submission of the case to a jury.

ARGUMENT.

Mr. Justice Holmes, when sitting in the Supreme Court of Massachusetts, said, in his opinion in the case of Stoddard v. R. R., 181 Mass. 422:

> "The liability of a carrier to a passenger is based upon fault, however high the criterion of duty may be placed."

It is fundamental in the law of torts that liability springs from some breach of legal duty. It is a principle that accords with and springs from the most primitive as well as the most enlightened concepts of right and wrong. It has been recognized and applied by all races of whose jurisprudence we have a record. It was developed and consistently applied long before railroads were ever thought of. If that rule is to be departed from with respect to railroads, it can only be justified by compelling considerations of public policy. Does the situation here presented call for a departure from the accepted rule of liability and require that the Southern Railway Company shall be subjected to the payment of a large judgment for personal injuries involved without any fault whatever on its part? The record discloses that it owned a line of railroad through Indiana, with which the Evansville, Indianapolis & Terre Haute Railroad Company sought to secure a connection. The Evansville road was, under the laws of Indiana, entitled to this connection, and under the same laws

the Southern Railway Company was compelled to permit it. This connection involved the installation of a switch. The switch was for the exclusive use of the Evansville road. The Southern Railway had no need for this switch and did not use it. The switch was operated exclusively by the employes of the Evansville road. If Hussey's injuries were the result of negligence, such negligence was that of the employes of the Evansville road. There was no negligence on the part of the employes of the Southern Railway Company. The Court of Appeals has concluded that under the decision of this Court in the case of Illinois Central v. Barron, 5 Wall. 90, it was required to hold that the Southern Railway Company is responsible for the negligence of the Evansville Company under the facts as above outlined.

In so holding, we submit that the Court misconstrued the effect of the decision of this Court in the Barron case; that it failed to consider that the precise question for determination by this Court in that case was whether or not, under the *Illinois law*, the Illinois Central Railroad was liable to one of its passengers for an injury caused by negligence in the operation of a Michigan Central train which had running rights over the Illinois Central tracks. This Court, in sustaining a judgment against the Illinois Central, said:

> "The question is not whether the Michigan Central is responsible, but whether the defendant, by giving to that company the privilege of using the road, have

thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois holding the owner of the road liable."

In support of its ruling this Court cited a number of Illinois cases and some from other states.

The Court of Appeals has interpreted the words, "we think rightly," appearing in the opinion of this Court, as giving sanction to a rule of general application in all states, regardless of the local law obtaining, where the question might arise. It failed to consider that this Court was required, in the Barron case, to apply the law of Illinois (R. R. v. Zachry, 232 U. S. 248; R. R. v. Sheegog, 215 U. S. 308), and that the language of this Court should be construed in the light of the precise question there presented. In Illinois it had been decided in early cases that a railroad admitting another upon its tracks was liable for the negligence of the road so admitted. The oldest of these Illinois cases is R. R. v. Dunbar, 20 Ill. 623. The reason for imposing such liability appears from the following extract from the opinion in that case:

"They (railroad companies) undoubtedly derive all their privileges, as well as their existence, from the power that creates them; and we must look to their charter for their power to act. * * * When these bodies accept their charters, they are held to enter into a contract with the state, to discharge all the

duties imposed, and to exercise the rights and privileges conferred on them, in the manner prescribed. * * * It will be observed that the Legislature has been specific in the enumeration of the powers granted, *but in them all, we nowhere find any, either expressly or impliedly, giving them power to lease their road so as to release them from liability.* If such lease be made, and the effect claimed results from them, railroads may avoid all liability to the public. And if such leases should be to irresponsible and reckless persons, the remedies for wrongs inflicted, duties omitted and contracts violated by the lessee, would not be worth pursuing. That the Legislature intended to confer such power on these companies we do not believe."

This quotation followed a statement by the Court that the question was a new one and that there were no authorities to guide it. It is to be observed that the decision in the Illinois case just referred to was based upon the opinion of the Court that a railroad company, under Illinois law, had no power to admit another company into the exercise of the privileges conferred by its charter by the state. This was followed by the case of R. R. v. McCarthy, 20 Ill. 385, where the same court adhered to the same rule of liability and there held that the person guilty of negligence becomes, in law, an agent of the railroad company. The same conclusion was again expressed in R. R. v. Whipple, 22 Ill. 105. This Court, in deciding the Barron case, which arose in Illinois, was compelled, by its rules

of decision, to apply the Illinois law, and the language of its opinion should be restricted to the facts and questions of law presented for decision. That this Court did not consider that in the Barron case it was laying down a rule of liability for universal application, is shown by its language in the subsequent case of R. R. v. Sheegog (opinion by Mr. Justice Holmes), where it was said:

> "Now, whether we agree with it or not, the doctrine is familiar that, *in the absence of statute*, a railroad cannot get rid of the liability attached to the exercise of its franchise by making a lease."

It is to be observed that the general statement of liability in the Barron case depended upon by the Court of Appeals is qualified in the statement in the Sheegog case and by it limited to those cases where no statute is made to apply. That the Sheegog case states the true rule of liability is, we submit, shown by the great weight of authority.

In 3 Thompson on Railroads, Sec. 3383, it is said:

> "The running powers having been granted to the company which has been guilty of the negligence, by or in pursuance of law, the law contents itself with holding the company owning the road and still operating it for itself answerable for its own negligence, and treats the negligence of the other company having such running powers, not as that of the agent of the company owning the road, but as that of a stranger,

and the injured passenger must seek his redress against the company which has really done the wrong."

In 1 Elliott on Railroads, Sec. 540, it is said:

"The lessor and lessee are usually jointly liable for negligence in the management of the road where the lease under which it is operated is unauthorized. There is a clear distinction between cases where the lease is authorized and where it is unauthorized. If the lease is unauthorized there is a joint wrong, for both parties assume to do what the law forbids. The one attempts to escape obligations the law imposes upon it by making a contract which it has no power to make; the other attempts to assume powers it cannot rightfully possess. The lease being void, the lessor has not transferred any duty, and the lessee, in assuming rights and powers to which it is not entitled, is really an intruder and usurper."

In the case of Stoddard v. R. R., 181 Mass. 422, the Court had before it a case in which a postal employe (having the status of a passenger) was injured while on a train of the N. Y., N. H. & H. Railroad. His injuries resulted from a collision with a New York Central train. The New York Central, presumably, had running rights over the New Haven tracks and its negligence caused the collision. The opinion was written by Mr. Justice Holmes, who was then a member of the Supreme Court of Massachusetts.

The Barron case was noted in the opinion. In that opinion Justice Holmes said:

> "But, even if it were shown, as it is not, that the defendant had done an act which in a remote sense made the accident possible, *such as making some contract of letting or hiring with the New York Central road,* to our mind it confuses all principles of liability based upon fault when such an act is relied upon as a sufficient ground of responsibility."

A most painstaking review of the authorities bearing upon this question is to be found in the opinion of Judge Goode in the case of Moorshead v. United Railways Co., 119 Mo. App. 541. Judge Goode was then sitting on the St. Louis Court of Appeals. He was later a Judge of the Missouri Supreme Court, and still later was dean of the Washington University Law School. In that case it was sought to hold the United Railways Company of St. Louis liable for the negligence of the St. Louis Transit Company. The United Railways Company was the owner of the street car lines in St. Louis. It entered into a contract under which the Transit Company operated the properties. This contract had been authorized by the City of St. Louis. Judge Goode reviewed all of the authorities and reached the conclusion that the rule of public policy, which, under other circumstances, would have made the United Railways Company liable for the negligence of the Transit Company, was changed by the permission which the City of St. Louis had given for the making of the contract be-

tween the two companies. That case was taken to the Supreme Court of Missouri where the opinion of Judge Goode was adopted as the opinion of the Supreme Court. It is reported in 203 Mo. 121.

Following the decision of the Moorshead case the Supreme Court of Missouri had before it the case of Booth v. St. Louis, I. Mt. & Southern, 217 Mo. 710. The plaintiff was a brakeman for the Missouri Pacific Railroad Company and was injured while the Missouri Pacific train on which he was employed was passing over a switch track belonging to the St. Louis, Iron Mountain & Southern. It was not disclosed by the evidence in the case whether the Missouri Pacific so operated its train over the Iron Mountain tracks by a lease or contract of some kind. In the Booth case the Supreme Court also reviews the authorities. Its conclusion, so far as it relates to the question of liability involved in this case, is in the following language:

> "When a railroad company is sued for an injury alleged to have been inflicted through the negligence of another company operating a train on its road, the burden of proof may be on the company that owns the road to show its lawful right to allow the other company to use its track, as in the Moorshead case above referred to, but when in such case the plaintiff does not show by what authority the other company is using the road and will not allow the defendant to show it, we have no right to assume that the use permitted was in violation of law or under conditions that rendered the owner of the track liable for the torts of the user."

This comment was provoked by the fact that the lower court had excluded evidence by which it was sought to show that the Missouri Pacific had a legal right to run over the Iron Mountain tracks, just as in this case the contract under which the E. I. & T. H. maintained the switch connection with the Southern tracks was excluded.

Further on in the opinion the Court said:

> "Under the facts of this case we hold that if the plaintiff was injured through the negligence of the Missouri Pacific Company the Iron Mountain Company is not liable, although the Missouri Pacific was at the time using the Iron Mountain track. If the Iron Mountain Company is held liable in this case it must be because of its own negligence."

The Missouri decisions are especially important, not because they state the law in Missouri, but because in the opinion by Judge Goode in the Moorshead case and in the unanimous opinion of the Supreme Court in the same case, and in the opinion in the Booth case they have reviewed all of the important cases upon the subject and have attempted to state the general rule supported by the weight of authority.

Coming now to the federal cases, the most complete review of the authorities is to be found in the case of Arrowsmith v. Railroad, 57 Fed. 165. The opinion in that case was written by Judge Lurton, then Circuit Judge, afterwards a Justice of the Supreme Court of the United

States. The case was one involving liability for the negligent killing of a mail clerk, who, it was decided, occupied the relation of passenger to the railroad. The suit was against the owner of the road as lessor and the operating company as lessee.

Judge Lurton concluded that under the authorities the lessor was not liable for the negligence of the lessee if the lease was authorized by law. In Railroad v. Hoechner, 67 Fed. 456, Judge Lurton wrote the opinion for the Circuit Court of Appeals for the Sixth Circuit, and his opinion was concurred in by Judge Taft, late Chief Justice of the United States Supreme Court, and by Judge Severens. The ruling in the Arrowsmith case previously decided by Judge Lurton was affirmed. Again in the case of Hukill v. Railroad, 72 Fed. 745, in an opinion by Judge Taft, concurred in by Judge Lurton, the ruling in the Arrowsmith case was affirmed. In Hayes v. Railroad, 74 Fed. 279, the Circuit Court of Appeals of the Seventh Circuit held that when a lease was made by legislative authority the lessor was not liable for the negligent operation of the lessee, and in so holding it referred to and affirmed the conclusions of Judge Lurton in the Arrowsmith case. In Willard v. Railroad, 124 Fed. 796, the Arrowsmith case was approved, and the same conclusion reached.

The Arrowsmith case was again cited with approval in the case of Yeates v. Illinois Central, 137 Fed. 943, where in an opinion by Judge Kohlsatt it was held that a plain-

tiff injured by collision of an Illinois Central engine with an engine of the Michigan Central, the latter having joint use of tracks with the Illinois Central, who owned the road, could only recover against the road guilty of the negligence causing his injury; and that the Illinois Central, owner of the road, was not liable for the negligence of the Michigan Central, who, under a contract, had the joint use of the Illinois Central tracks. In so deciding, Judge Kohlsatt said:

> "While the decision of the Illinois Court seems to hold that both the lessor and lessee companies can be held for the negligence of the lessee company, such has not been the holding of the federal courts in cases similar to that before the Court."

In the case of Clough v. Railroad, 155 Fed. 81, the plaintiff was an employe of a circus company which, under a contract with the railroad company, was having two of its circus trains moved over the railroad company's tracks. The railroad company furnished the engines and trainmen to handle these two trains. The trains collided and the plaintiff was thereby i ared. It was held that the railroad company was not liable.

In Pennsylvania Steel Co. v. New York City Ry. Co., 229 Fed. 367, the Circuit Court of Appeals for the Second Circuit had before it the problem of deciding whether the Metropolitan Street Railway Company of New York was liable for personal injury judgments obtained against the

New York City Railways Company. The opinion states the facts and its conclusions as follows:

"February 14, 1902, the Metropolitan Company leased its property and franchises for the term of 999 years to the New York City Railways Company. It was authorized to do this by the Railroad Law of the State of New York, then in force (Chap. 433, Laws 1893, now Sec. 148 of the Railroad Law). The tort creditors contend that, notwithstanding the lease, the lessor remains liable for any negligence in operation by the lessee, because there is no express exemption of the statute. The Court of Appeals of the State of New York has construed this law as relieving the lessor corporation of any such liability (Miller v. N. Y. L. & W. Ry. Co., 125 N. Y. 118). Similar statutes in some other jurisdictions have been differently construed, the courts holding that to relieve the lessor there must be an express exemption in the statute. *There is no authority in the Supreme Court controlling us.*

"Two cases are relied upon by the appellants. In Railroad Co. v. Brown, 17 Wall. 445, the plaintiff was a passenger traveling on a ticket of the lessor railroad company. The act complained of was an assault in the District of Columbia, where the road was being operated by equitable Receivers of the company; the balance of the road in Virginia being operated by the individual lessees. Mr. Justice Davis held: *First.* That a railroad could not escape from its charter duties by voluntary surrender of its road to lessees. He was considering whether there was any difference between an operation under a lease from

the company and under Receivers appointed by the Court. A lease without the consent of the state would be invalid (Thomas v. Railroad, 101 U. S. 71; Abbott v. Railroad, 80 N. Y. 27). At all events there was no reference to any statute authorizing the lease in question, and, of course, no reference to any judicial decision construing such a statute. *Second.* As the lessor company allowed tickets to be issued in its name over the whole line, on one of which the plaintiff was traveling at the time of the acts complained of, it was liable in contract to her. There is no such feature in the case under consideration. The other case, C. B. & Q. R. R. Co. v. Willard, 220 U. S. 413, arose out of an accident in the State of Illinois, whose statute had been construed by the Supreme Court of that state as not exempting the lessor. There being no case controlling us, we are content, even if it is not binding on us, to adopt the construction of the New York statute given it by the Court of Appeals of that state. See also Cain v. Railroad Co., 27 App. Div. 376, 50 N. Y. Supp. 1."

In the case of Cain v. Railroad, the case referred to by the Court of Appeals for the Second Circuit in the case just quoted from, the plaintiff was injured by a coal train of the D. L. & W. Railroad, which was running over the tracks of the defendant in that suit, under a contract between the two railroad companies. The New York Court of Appeals, in its opinion, said:

"The defendant's contention is that it did not actually or constructively do the acts of which the

plaintiff complains. The plaintiff's contention is that the defendant, by accepting the benefits of its corporate franchise and privileges, assumed the obligation of so using them as to protect the public, and thus the plaintiff, from injuries from the negligent use.

"By Chapter 218, Laws of 1839, Sec. 1, it was provided that: 'It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of the irrespective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the use of the road of any railroad corporation by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract.'

"This provision was incorporated in The Railroad Law (Chap. 565, Laws of 1890, Sec. 78, as amended by Chap. 433, Laws of 1893) as follows: 'Any railroad corporation, or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract.'

"Thus, the contract between the two corporations was a lawful one. The defendant did not violate its corporate franchises and privileges in making the contract with the Lackawanna Company, and in observing its obligations on its part—that is, permitting the latter company to run coal trains on its road. As the defendant did no unlawful act, or no lawful act in

a negligent manner, causing damage to plaintiff, it is not liable to her."

In Sprague v. Smith, 29 Vt. 421, Judge Redfield, then sitting on that court, said:

> "But in those cases, where other companies *have the right by law* to run their carriages upon the track of the defendant's road, by paying toll, as is common in England and not uncommon in this country, in point of right, although not done practically to any great extent, it has never been held that one company is liable to passengers carried by them for injuries happening through the fault of other companies, while rightfully upon the same track, and without any fault of the party of the first part. This principle, it seems to us, must control the present case. The defendant's contract only bound them for the skill and diligence of their own operations and those under their own control."

The Supreme Court of Georgia, in the case of Railroad v. Fridell, 79 Ga. 489, expresses the true rule and the underlying reason in the following quotation:

> "Where there is a mutual agreement for the joint use of terminal tracks between the company owning them and another company also having a chartered right to enter the same city, they are entitled to make use of common tracks at the terminal point, and in so doing the licensee exercises its own franchises and not those of the licensor, and the latter is not liable to its

employes for injuries caused by the negligent use of a common track by the employes of the licensee company."

An examination of the English cases will show that the earlier ones were in accord with the Illinois cases hereinabove referred to, and referred to in the Barron case, and for much the same reason. But, after Parliament had sanctioned the leasing and granting of running rights by one road to another, the rule of liability changed, and the rule now in England with respect to liability is in accord with the rule for which we are here contending. This is illustrated by Wright v. Midland Rwy., L. R. 8 Exch. 137. In that case the owning road was sued by one of its passengers for injury received in a collision with a train of another railroad having running rights over the tracks of the owning road. The collision was caused by a failure of the road having such running rights to obey signals. The Exchequer held that the owning road was not liable for the injury thus occasioned its own passenger.

It will be observed that the foregoing cases deal with the liability of carriers who, under legislative authority, *permit* the use of their tracks by other roads. But here we have a situation where the Southern Railway Company was not only permitted to allow the switch connection in question, but under the Indiana Statutes was *compelled* to so allow it. This compulsion, we submit, should be conclusive of the question here presented, even if the views expressed

in the cases above cited should be held not applicable. It would be shocking to all reason and sense of justice to say that the Southern Railway Company is liable for the negligence of the Evansville, Indianapolis & Terre Haute Railroad Company, whose presence upon its property was compelled by the law of the state under which it operated.

A similar situation was before the Circuit Court of Appeals for the Second Circuit in the case of R. R. v. Baker, 98 Fed. 694. A passenger of the railroad was injured by a derrick used in raising the grade of a railroad bridge and constructing certain approaches in the City of New York. The elevatior of the bridge and the construction of the approaches had been commanded by a statute of that state. Under this statute the work was being done under the supervision and under a contract with the Board of Improvement of Park Avenue Above One Hundred and Sixth Street, in the City of New York, which board was created by the Act of the Legislature referred to. The derrick whose negligent operation caused the injury was being used by a contractor on this work. Upon a review of the cases bearing upon the question of liability there presented, including the Barron case, the Court of Appeals decided that the railroad was not liable for the negligence of the contractor, and in so deciding it said:

> "It will be observed that through all these cases there runs the idea of choice—the power to act or refrain from acting. The company need not have taken a lease; it could have built and operated its own road.

It need not have allowed an independent road to run cars on its track; it could have kept them off. It need not have carried its passengers in cars of another company; it could have provided its own, etc.

"The state intervened and directed that a work, which it had the power to require to be done, should be done, not by the railroad, nor even by the city, but by an independent board, in the creation of which the defendant had no voice, over whose selection of employes it had no control, with the discharge of whose functions it could not interfere, and whose operations it was powerless to prevent."

And the reasoning of the Court of Appeals in the case referred to is directly in point on the case here presented. By the Sixth Subdivision of Section 12931, Vol. 3, of Burns' Anno. Indiana Statutes 1926 a railroad company was given the right to "cross, intersect, join and unite its railroad with any other railroad before constructed at any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches and other conveniences, in furtherance of the objects of its connections; **and every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections, connections and grant the facilities aforesaid.**" Here, as we have repeatedly said in this argument, was an express command from the State of Indiana requiring the Southern Railway Company to permit the Evansville Company to construct, maintain and operate the switch in ques-

tion, and if in that situation it is to be said that the Southern Railway Company is responsible for the negligence of the employes of the Evansville Company, over whom it had no control, a rule of liability will be imposed that is shocking to every sense of justice and which heretofore has not been supported by the decisions of any court having to deal with the subject.

Now, we submit to your Honors that a correct rule of liability cannot be declared in the present case without consideration of the vast change which has taken place in the relationship of the railroads of the country to the Federal Government and to the various states through which they operate. Nor can this case be disposed of without consideration of the laws of Indiana particularly applicable to railroads.

Since the decision of the Illinois cases upon which the Barron case was decided, in the middle of the nineteenth century, the railroads have come more and more under federal and state regulation. Their relationship to each other is now almost completely controlled by state or federal laws. No road can lease or acquire another without permission of the Interstate Commerce Commission. No road can purchase control of the stock of another road without such permission. The power of private control over railroads is gone, and with it have gone also the evils which the Illinois courts feared, and the reasons which impelled them to impose liability on the owning road for negligence

and tortious acts of another road of which the owning road was in no sense guilty.

It would serve no useful purpose to point out all of the powers exercised by the Interstate Commerce Commission over the railroads of the country, but it is of interest in the decision of the question here presented to point out that by Paragraph 9 of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission is given authority to compel interstate railroads to accord switch connections to any "lateral, branch line of railroad, or private sidetrack." Under this the Interstate Commerce Commission could have compelled the Southern Railroad to allow the Evansville, Indianapolis & Terre Haute to make the connection at Mine Junction, which was, in fact, made by agreement between these railroads without any such compulsion on the part of the Commission, but under compulsion of the Indiana statute. And the dominance of the Interstate Commerce Commission is shown by Section 4 of Paragraph 3 of the Interstate Commerce Act, which is as follows:

> "If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have the power to require the use of any such terminal facilities, *including main-line track or tracks for a reasonable distance outside of such terminal,* of any carrier by another carrier or other

carriers on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

And by Paragraph 2 of Section 5 of the Interstate Commerce Act one carrier is authorized to lease the road, or acquire the stock of another carrier, *subject to the approval of the Commission.*

It will be observed of these provisions of the Interstate Commerce Act that they both permit, and in some cases require, one road to grant the use of its track to another road. And if an owning road can be compelled to grant the use of its track to another road, is it not shocking to one's sense of justice, and contrary to the accepted rules of liability, to declare that the owning road, under such circumstances, should be made liable for the negligence of the road which, without its consent, is admitted to the use of its properties?

Coming now to the laws of Indiana:

By Section 12808, Burns' Anno. Ind. Stat. 1926, the Railroad Commission of Indiana is authorized, and it is made its duty

"to require and supervise the location and construction of sidings and connections between railroads, to

supervise crossing of the tracks and sidetracks of railroads by other railroads now in process of construction or extension, and to prescribe the terms and conditions and manner in which such crossings shall be made," etc.

This is the section to which we have heretofore referred. By subsection "j" of the same section it is provided that

"all railroads subject to this act and operating railroads shall afford reasonable and proper facilities for the interchange of traffic between their respective lines at junction points."

By subsection "k" it is provided that

"every such carrier shall, upon request and upon the payment of reasonable compensation therefor, construct a switch connection from its line to and connecting with any lateral or branch line of railroad, or any private or industrial switch, which shall be constructed adjacent to its line and property in this state, whenever such connection is reasonable, practicable and can be put in with safety, and a reasonable necessity therefor exists. In case of a disagreement thereon, the Commission, upon application, shall determine the compensation for making such connection and maintaining the same."

By section 13106 it is provided that railroad companies organized under the General Railroad Act

"shall have the power to make leases and operating agreements with the electric street or interurban street

railroads, now or hereafter incorporated under the laws of the State of Indiana, and when such leases and operating agreements have been entered into, to make physical connection with each other to be operated by electricity, either jointly or otherwise, and shall have all the rights and privileges accorded to street and electric railways, and shall have the right for the interchange of traffic so as to make one continuous line."

Section 13079 provides that where it is

"necessary or convenient for one railroad company to temporarily 'detour' its trains over the tracks of another road, such other road shall provide suitable engineer or conductor to take the train over the latter road.".

These provisions of the Indiana statutes are pointed out for the purpose of showing the control which the Railroad Commission of Indiana has over railroads in that state, the compulsion to which they are subjected in the way of facilitating traffic over each other's lines and the corresponding right which is granted to one road to operate over another road under the conditions prescribed.

Besides the statutes just referred to, the Legislature of Indiana had passed the statutes which were pleaded in the defendant's answer in this case.

By the sixth subdivision of Sec. 12931, Vol. 3, Burns' Annotated Indiana Statutes, 1926, the E. I. & T. H. was granted the right

"to cross, intersect, join and unite its railroad with any other railroad before constructed, to any point on its route, and upon the grounds of such other railroad company, with the necessary turnouts, sidings, switches, and other conveniences in furtherance of the objects of its construction; and every company whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant the facilities aforesaid."

Also sections 13206, 13207 and 13208 of the Indiana statutes are as follows:

"Sec. 13206. (Contracts between connecting roads.) All railroad companies now organized or that may be hereafter organized under the laws of this state, having connecting roads, may enter into contracts by their respective boards of directors by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, may be run and operated over and upon the track and road of another railroad company, upon such terms as the said companies may agree upon.

"Sec. 13207-2. (Contracts ratified.) All contracts heretofore made in good faith between railroad companies organized under the laws of this state, acting by their respective boards of directors, by which the locomotives and trains of one railroad company, for the transportation of freight and passengers, are to be run and operated over the track and road of another railroad company, are hereby ratified and made legal.

"Sec. 13208. (Liability to third persons.)—3. Every railroad company that shall run and operate its locomotives and trains upon the track and road of another railroad company shall be liable to third persons for all damages by such locomotives and trains, in the same manner and to the same extent as though the track and road upon which such locomotives and trains were run and operated belonged to the company owning and operating the same."

The Supreme Court of Indiana in R. R. v. Railroad Commission, 171 Ind. 189, which was a case involving an order of the Railroad Commission requiring the building of an interchange track five hundred feet long, said of some of the laws above referred to:

"The very purpose of the statutory requirement and order is to facilitate the movement of commerce, that the two railroad companies may the more efficiently perform the function for which they were chartered."

Now, under the laws of Indiana both these companies had the right to make the contract which was offered in evidence and excluded by the Court. In making such contract these companies did not violate any of the duties imposed by law upon them. When the Legislature of Indiana enacted these statutes it was made obligatory upon all railroads operating in that state to permit just such connections as were made between the Southern Railway

Company and the E. I. & T. H. at Oakland City and Mine Junction. The Southern Railway Company had no power to refuse such a connection. Recognizing the right of the E. I. & T. H. to make its connection with the Southern rails, and in order to sensibly comply with the law, the two companies made a contract under which the switch in question was to be installed and operated. This contract was in strict compliance with the Indiana statutes and permitted by such statutes. The Southern Railway was not attempting to evade any of its public duties. The E. I. & T. H. Railway was chartered by the State of Indiana and was and is a railroad on a par with the Southern. It is not an irresponsible railroad company. The Indiana statute expressly makes it responsible for its own negligent acts in the operation of this switch and in running over the Southern tracks. There is nothing in the facts to evidence any attempt by either company to evade its just responsibilities. If any company was negligent, causing this plaintiff injury, it was the E. I. & T. H. We deny there was any such negligence; but if there was, this plaintiff can sue and recover against the E. I. & T. H., and any judgment he obtains will undoubtedly be paid. But we say that the Southern, by permitting the E. I. & T. H. to operate this switch and over its lines, under a contract authorized by the State of Indiana, is not liable for any negligence of the E. I. & T. H. employes.

By admitting the Evansville, Indianapolis & Terre Haute to make a switch connection with its road it vio-

lated no duty to the State of Indiana; in fact, it was required by the laws of Indiana to do so. It violated no duty to the public, of which plaintiff was one. It violated no duty to plaintiff, because none of its employes were negligent. It did not violate its contract of carriage, because a carrier of passengers only contracts to use that degree of care in transporting them which the law prescribes. It does not *warrant* safe passage. Permitting the Evansville road to make the connection and maintain the switch was not carelessness and, therefore, was no violation of its contract with its passengers. If, then, as is universally held, liability for negligence implies a violation of some duty from which injury results, what is the duty that the Southern Company violated which would impose liability upon it? It violated no duty to anyone and it, therefore, cannot be held liable. The laws of Congress embodied in the Interstate Commerce Act, and the laws of Indiana reflected in the statutes which we have cited, and the laws of all the other states which are similar to those of Congress and those of Indiana, have swept away the reasons underlying the old cases which imputed to the owning road the negligence of other roads using its tracks, and have left the question of liability for negligence to be determined by the universal principles applicable thereto. And the controlling principle is, that one is liable for his own negligent acts, for a violation of some duty he owes, and is not liable for a violation of duties

owed by persons over whom he has no control. In this case the Southern Railroad Company had no supervision whatever over the train crew of the Evansville road which was operating its switch. That control was exercised exclusively by the Evansville Company. The Southern Company did not hire them; it could not discharge them. That power rested exclusively in the Evansville Company. And so we say that no reason can be given for holding the Southern Company liable for what the Evansville employes may have done or left undone.

Upon consideration of the matters set out in the petition for certiorari and in this brief your petitioner asks that the petition for writ of certiorari be granted.

Respectfully submitted,

SAMUEL B. McPHEETERS,
CHARLES A. HOUTS.

H. N. QUIGLEY,
Of Counsel.